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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KENT BORDEN ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD G. PRECUP
NUSSBAUM, OWEN & WEBSTER
1800 M Street, N.W.
Washington, D.C. 20036
(202) 833-8900
Counsel of Record for Petitioner

Of Counsel:

LUCIEN HILMER
1800 M Street, N.W.
Washington, D.C. 20036

NORMAN D. JAMES
10960 Wilshire Boulevard
Los Angeles, California 90024

June 29, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED FOR REVIEW

In a prosecution for bankruptcy fraud and conspiracy, where defendant raises the issue whether the government's evidence was derived wholly from sources independent of defendant's testimony given under statutory immunity in the bankruptcy proceeding, can the government's heavy burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), be constitutionally sustained solely by untested affidavits without an evidentiary hearing?

LIST OF ALL PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were the United States, Kent Borden Rogers, and Jacob N. Peilte.[1]

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[1] Peilte has stated that he has no interest in the outcome of this petition.

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OPINION BELOW

United States v. *Kent Borden Rogers*, No. 82-1286, *United States* v. *Jacob N. Peilte*, No. 82-1287, 722 F.2d 557 (9th Cir. 1983), attached to this Petition at Appendix 1a.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1983. Petitioner's petition for rehearing was denied May 1, 1984. This Court has jurisdiction on certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. amend. V:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. Bankruptcy Act of July 1, 1898, c. 541, § 7, 30 Stat. 548, as amended by Act of May 27, 1926, c. 406, § 4, 44 Stat. 663; Act of June 22, 1938, c. 575, § 1, 52 Stat. 847; Act of July 7, 1952, c. 579 § 4, 66 Stat. 422; Act of October 15, 1970, Pub. L. 91-452, Title II, § 207, 84 Stat. 929; formerly 11 U.S.C. § 25(a)(10) and (b):

> (a) The bankrupt shall * * * (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in

evidence against him in any criminal proceeding except such testimony as may be given by him in the hearing upon objections to his discharge * * *.

(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

KENT BORDEN ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kent Borden Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 28, 1983.

STATEMENT OF THE CASE

On October 4, 1976, petitioner Kent B. Rogers, president and majority stockholder of Global Western Development Corporation (Global), transferred from Global to another corporation owned by him a tract called Whiting Ranch. Two hours later, Rogers and his attorney, Jacob N. Peilte, co-defendants below, filed a petition in bankruptcy on behalf of Global under Chapter XI of the Bankruptcy Act then in force.[2] The bankruptcy petition and

[2] The bankruptcy petition, filed before the effective date of the Bankruptcy Reform Act of 1978, continued to be governed by the provisions of the earlier law. See the Ninth Circuit opinion below, 722 F.2d at 559 n.1, Appendix at 4a. In 1970, the immunity provision of

schedule did not list Whiting Ranch as a Global asset and made no reference to its recent transfer.

During the bankruptcy proceeding, Rogers gave frequent testimony. As Global's president and majority stockholder, he was required to do so, and he was immunized with respect to such testimony under sections 7(a)(10) and (b) of the Bankruptcy Act, former 11 U.S.C. §§.25(a)(10) and (b). The bankruptcy proceeding continued throughout the criminal trial described below.

In November 1977, petitioner, by stipulation, voided the transfer of Whiting Ranch and made the property part of Global's bankruptcy estate. (Exh. A to Opposition, 11/4/81, to Motion for Order Requiring Government to Demonstrate Independent Source.) Nearly three and a half years later, in March 1981, federal prosecutors began to present evidence before a grand jury seeking an indictment for bankruptcy fraud. On September 9, 1981, the grand jury indicted Rogers and his attorney, Peilte, charging them with conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371, and alleging ten counts of substantive bankruptcy fraud in violation of 18 U.S.C. § 152, all arising out of the Global proceeding.[3]

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the Bankruptcy Act, § 7(a)(10), former 11 U.S.C. § 25(a)(10), was amended to conform to the use immunity provision of the Organized Crime Control Act of 1970, 18 U.S.C. § 6002, which was the statute construed in Kastigar v. United States, 406 U.S. 441 (1972). The Bankruptcy Reform Act replaced former § 7(a)(10) by incorporating the immunity provisions of 18 U.S.C. §§ 6001-6005. 11 U.S.C. § 344. There is no significant difference between the provision construed in *Kastigar* and the provision at issue in this case. In re North Am. Inv. Co., 559 F.2d 464 (7th Cir. 1977); Block v. Consino, 535 F.2d 1165 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976). The question raised in this petition is the same under the present and former law.

[3] Petitioner was charged with six of the ten counts. The district court had jurisdiction over the offenses under 18 U.S.C. § 3231.

Count 11 of the indictment charged Rogers with fraudulent withholding of Global's records.

Among the grand jury witnesses presented by the prosecution was Robert A. Fisher, Global's trustee in bankruptcy. Fisher's grand jury testimony included information about Rogers' immunized testimony given before the bankruptcy court (Trial Transcript at 309):

> However, in around February, shortly prior to that time, Mr. Rogers had stated in a court proceeding that he had some records and that consisted of about, as I recall, four or five, six file cabinets full of records, stated that he would deliver them to me.

On October 23, 1981, following pleas of not-guilty by both defendants, Rogers filed a motion, predicated on *Kastigar* v. *United States*, 406 U.S. 441 (1972), for an order requiring the government to demonstrate that its evidence against him was derived from sources independent of his immunized testimony in the bankruptcy proceeding.

The government opposed the motion and filed seven affidavits (called "declarations"), among which were one by the prosecuting attorney;[4] one by the bankruptcy auditor;[5] one by the FBI agent in charge of the investigation;[6] one by a newspaper reporter;[7] and one by Fisher, Global's trustee in bankruptcy.[8]

The affidavits were mostly conclusory in nature. They generally denied access to or use of petitioner's immu-

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[4] Declaration of Percy Anderson, Nov. 4, 1981.

[5] Declaration of Richard S. Roberts, Nov. 4, 1981.

[6] Declaration of Charles Sullivan, Nov. 10, 1981.

[7] Declaration of Joseph Cordero, Nov. 4, 1981.

[8] Declaration of Robert A. Fisher, Nov. 2, 1981.

nized testimony given in the Global bankruptcy proceeding; they referred to public records and newspaper articles as sources of the government's information; they made no attempt to establish that the government's trial evidence was derived entirely from sources independent of Rogers' immunized testimony.

Prosecutor Anderson's affidavit stated that a week before the indictment he interviewed Fisher, Global's trustee in bankruptcy, and obtained from him a transcript of Rogers' testimony before the bankruptcy court, but denied reading or discussing its contents. The court-appointed auditor of Global's records attested that prior to September 23, 1977, four years before the indictment, he had never attended any bankruptcy proceeding in which Rogers testified, but his affidavit was silent about any Rogers testimony after that date. The newsman admitted examining certain records of the bankruptcy court, but denied having had access to "any bankruptcy court proceedings" prior to his newspaper story of March 27, 1978, three and a half years before the indictment. Like the auditor's affidavit, the newsman's was silent about access to Rogers' immunized testimony after that date, and it was silent about any subsequent communications with the government. The FBI agent's affidavit actually admitted discussing Rogers' bankruptcy testimony with the attorney for Fisher, a prosecution witness. Fisher's affidavit merely denied that Rogers gave testimony about "funds administered during the Chapter XI proceedings."

On November 9 and 12, 1981, the trial court heard oral argument on petitioner's pretrial *Kastigar* motion. On January 21, 1982, the first day of trial, the court denied the motion without any statement of reasons (Trial Transcript at 173).

Defendants waived a jury. Witnesses at trial included Aaron K. Phelps, the presiding judge in the Global bankruptcy proceeding; Fisher, Global's trustee in bankruptcy; and C.E.H. McDonnell, counsel to the trustee.

Defense counsel sought evidentiary hearing on the *Kastigar* issue not only before trial, but during and after trial.[9]

Part of the trial testimony concerned bankruptcy litigation in Texas, involving a company that held deeds of trust on Whiting Ranch. Under questioning by the prosecutor, Bankruptcy Judge Phelps testified (Trial Transcript 197-98):

> There was some litigation in Dallas, Texas, that was quite a big argument, and we had many arguments in my court in which Mr. Peilte and Mr. Rogers participated in, so I am sure that they disclosed information concerning that litigation.

Defense counsel in turn started to question Judge Phelps about Rogers' bankruptcy testimony regarding the Whiting Ranch, but did not pursue the inquiry when the trial court warned that such pursuit might waive his client's immunity (*id.* at 203).

In response to the prosecutor's direct examination of the trustee in bankruptcy concerning alleged withholding of Global records from him, Fisher testified that he had requested such records from Rogers "at various court hearings" (*id.* at 228). On cross-examination, defense counsel started to pursue the *Kastigar* issue, but was again deterred by the court's warning that such pursuit might constitute a waiver of immunity (*id.* at 259-61). The

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[9] Defendant Rogers' Motion for Order Requiring Government to Demonstrate Independent Source of Evidence, filed Oct. 23, 1981; Trial Transcript at 203-205, 259-261; Supplemental Memorandum of Points and Authorities in Support of Motion for New Trial, filed April 5, 1982, pp. 12-21.

court stated, however, that in connection with a post-trial *Kastigar* motion it would allow counsel "to put in whatever evidence is appropriate" (*id.* at 262).

At the close of the government's case, and again at the conclusion of trial, defense counsel renewed his motion under *Kastigar*, expressly requesting an evidentiary hearing to determine whether the government's evidence was derived entirely from sources independent of Rogers' immunized testimony (*id.* at 880). The court denied the renewed motion (*id.* at 899).

Thereupon the court found petitioner guilty on the conspiracy count and on four of the six other counts charged against him, including the charge of withholding records. (The government had dropped one substantive count at trial, and the court acquitted petitioner of another.) On May 3, 1982, petitioner was sentenced to concurrent terms of five years' imprisonment on each count (all but six months of which were suspended), five years' probation, 300 hours of community service, and fines of $20,000. Petitioner's pretrial bond was continued and a stay of execution ordered, pending appeal. On May 7, 1982, petitioner filed timely notice of appeal.

On December 28, 1983, the court of appeals affirmed the conviction, ruling it was not clearly erroneous for the trial court to find the government's evidence untainted by the immunized testimony. 722 F.2d at 560, Appendix 5a hereto. While the court of appeals held Fisher's testimony before the grand jury "improper," the court deemed it harmless error "in light of the more than adequate untainted evidence to support the indictment." *Ibid.* A timely petition for rehearing was denied by order dated May 1, 1984. Appendix 26a.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Involves A Recurring Constitutional Issue Concerning The Government's Discharge Of Its Heavy Burden Under Kastigar.

In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court held that the Fifth Amendment privilege against compelled self-incrimination was satisfied by statutory "use and derivative use" immunity, and did not require "transactional" immunity theretofore believed necessary under dictum in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

Kastigar put to rest the concern that use immunity might not afford adequate protection against indirect use of compelled testimony. It did so by construing the statute[10] as a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom," including any use in gathering investigatory leads or in focusing an investigation on a particular witness. 406 U.S. at 460. *Kastigar* ensured the enforcement of the statute's "total prohibition on use" (*ibid.*) by placing a heavy evidentiary burden on the government:

> One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.

406 U.S. at 461-62 (footnote omitted).

During the dozen years since this Court's pronouncement in *Kastigar*, courts of appeals have often dealt with the question of how the government may properly satisfy

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[10] The statute construed in *Kastigar* is not significantly different from the statute at issue in this case. See note 2 above.

its burden of proof. This Court, however, has heretofore furnished no guidance on the question. The Ninth Circuit's decision below permitted the government to meet its burden solely by affidavits, mostly conclusory in nature; several were couched in studiously limited terms. Yet petitioner was denied the opportunity to confront the affiants, to test the truth and completeness of their declarations, or to inquire into any aspect of indirect use of petitioner's immunized testimony. Especially in view of the nature and limitations of the government's affidavits, defense counsel had good cause to request opportunity to question the government's declarants. The importance of preserving Fifth Amendment protection for witnesses who give immunized testimony and the need to conduct an evidentiary hearing on the *Kastigar* issue in order to assure "total prohibition on use" of such testimony call for the grant of this petition and for this Court's clarification of the proper means of implementing *Kastigar*. *See Securities and Exchange Commission* v. *United Benefit Life Insurance Company*, 387 U.S. 202, 207 (1967).

In cases where no evidentiary hearing has been held, the courts of appeals have readily reversed the district courts. In *United States* v. *Tantalo*, 680 F.2d 903, 909 (1982), the Second Circuit held that denial of the defendant's *Kastigar* motion without an evidentiary hearing was reversible error. In *United States* v. *Beery*, 678 F.2d 856 (1982), the Tenth Circuit remanded for a hearing where the prosecutor made only general denials that he had access to the defendant's testimony in a bankruptcy proceeding. In *United States* v. *Kurzer*, 534 F.2d 511 (1976), the Second Circuit, and in *United States* v. *DeDiego*, 511 F.2d 818 (1975), the District of Columbia Circuit reversed dismissals of indictments where the *govern-*

ment had been denied a hearing to show that its evidence was derived entirely from sources independent of immunized testimony.

Most appellate decisions have found the government's *Kastigar* showing sufficient when it included testimonial evidence. *United States* v. *Romano*, 583 F.2d 1 (1st Cir. 1978) (documentary evidence, affidavits, and prosecutor's testimony on the sources of the indictment's 51 counts); *United States* v. *Seregos*, 655 F.2d 33 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982) (two days of testimony by prosecutor and FBI investigator); *United States* v. *Bianco*, 534 F.2d 501 (2d Cir.) *cert. denied*, 429 U.S. 822 (1976) (evidentiary hearing at which two government witnesses traced all evidence); *United States* v. *Catalano*, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974) (detailed testimony by prosecutors tracing evidence); *United States* v. *First Western State Bank*, 491 F.2d 780 (8th Cir. 1974) (testimony and introduction of FBI reports); *United States* v. *Weiner*, 578 F.2d 757 (9th Cir.) *cert. denied*, 439 U.S. 981 (1978) (testimony and affidavits). In *United States* v. *Pantone*, 634 F.2d 716 (1980), the Third Circuit did not describe the hearing evidence, but noted that the trial court had held a "full *Kastigar* hearing."

The Ninth Circuit decision below and a recent Fifth Circuit decision, however, appear to stray from the testimonial requirement implicit in *Kastigar* and call for guidance from this Court. In *United States* v. *Sockwell*, 699 F.2d 213 (5th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2106 (1983), the defendant testified before a grand jury under a grant of immunity. Three years later, a second grand jury indicted him on charges that stemmed from the subject under inquiry before the first grand jury. Sockwell asserted that his immunized testimony

was improperly disclosed to the second grand jury. The trial court disposed of the question without an evidentiary hearing. The court merely read the second grand jury record *in camera*, with defense counsel present, and summarily concluded that the evidence before the second grand jury "came wholly from other sources." 699 F.2d at 218. The Fifth Circuit upheld the conviction.

In the instant case, the Ninth Circuit has further eroded the constitutional protection mandated by *Kastigar*. Petitioner sought an evidentiary hearing before, during, and after trial,[11] but none was granted.[12] The government's heavy burden was deemed satisfied solely by untested affidavits. The violence this procedure wrought on petitioner's Fifth Amendment privilege is manifest:

—The prosecutor's affidavit cited two newspaper stories as "an independent source" of the government's evidence,[13] but stated nothing to negate the newsman's access to or use of Rogers' immunized testimony.

—The newsman's affidavit attested to his "inquiry to the United States Bankruptcy Court in Santa Ana" with

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[11] Two courts of appeals have held that the evidentiary hearing may appropriately be held at any of these times, or any combination of them. United States v. Tantalo, 680 F.2d 903 (2d Cir. 1982); United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975).

[12] The "pretrial hearing" mentioned in the opinion below, 722 F.2d at 560, Appendix at 5a, referred not to any evidentiary hearing, but to the oral argument on petitioner's motion for such a hearing.

[13] Declaration of Percy Anderson, Nov. 4, 1981. Only its paragraph 8 refers to any independent source for the government's evidence:

> 8. An independent source for the Government's evidence in the instant proceedings that I have reviewed is two newspaper articles published in March of 1978 which detail the entire fraudulent transaction involving Kent Rogers. A copy of the articles is attached hereto as Exhibit B and incorporated herein by reference.

respect to the Global bankruptcy petition and list of creditors. It attested to subsequent research in which he "examined other records and conducted interviews throughout Southern California and the nation, including some of the individuals identified on the schedule of creditors." Yet in apparent self-contradiction the newsman's affidavit denied access, prior to his article in March 1978, to "any bankruptcy court proceedings involving the ranch."[14] The denial of petitioner's request for an evidentiary hearing denied him any opportunity to cross-examine the newsman, to ascertain the identity of his interviewees and whether any of them heard or read Rogers' bankruptcy testimony, to determine whether the newsman had access to Rogers' testimony either before or after his publication, or to explore the affidavit's facial inconsistencies.

—The affidavit of a claimant in the Global bankruptcy proceeding attested that on September 23, 1977, he informed the bankruptcy court of the transfer of Whiting Ranch and that "prior to my disclosure in Court, I had never attended any bankruptcy proceedings in which Kent Rogers testified."[15] His affidavit is silent, however, about any attendance after that date, and silent about any subsequent contact with the government. Without an evidentiary hearing petitioner was denied an opportunity to inquire into the claimant's attendance at Rogers' testimony, and his subsequent dealings with the government, in the four-year period between September 1977 and petitioner's indictment in September 1981.

—The affidavit of the trustee in bankruptcy attested merely that Rogers' bankruptcy testimony did not relate

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[14] Declaration of Joseph Cordero, *supra*, ¶¶ 4, 5, 7.

[15] Declaration of Richard S. Roberts, *supra*, ¶¶ 9, 10.

to funds administered during the Chapter XI proceeding," and that on one occasion the bankruptcy judge precluded questioning Rogers about the transfer of Whiting Ranch.[16] On the *Kastigar* issue, matters that were not the subject of Rogers' testimony are, of course, far less pertinent than matters that *were* the subject of such testimony. Yet petitioner was accorded no opportunity to have the trustee identify any such subjects.

—The affidavit of the FBI investigator admitted discussing one aspect of Rogers' bankruptcy testimony with the attorney for the trustee,[17] but did not disclose what leads such testimony may have furnished for the FBI investigation. Though using compelled testimony as an investigatory lead is expressly barred by *Kastigar*, 406 U.S. at 461, petitioner was denied opportunity to discover whether his testimony was improperly used as such a lead.

In sum, the only burden carried by the government was that found in its untested affidavits. As shown, the affidavits were either so conclusory or so limited as to raise more questions than they answered. Yet these affidavits ended all inquiry into possible use or derivative use of Rogers' immunized testimony. The bankruptcy judge and the trustee testified at trial, but attempts by defense counsel to question them on *Kastigar* matters were met by the trial court's warning of the risk of waiver. The court's promise of a post-trial evidentiary hearing was never fulfilled.

The decision below represents the latest and most striking example of the threatened erosion of the Fifth

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[16] Declaration of Robert A. Fisher, *supra*, p. 2.

[17] Declaration of Charles Sullivan, *supra*, ¶¶ 5, 6.

Amendment safeguards enunciated in *Kastigar* with respect to use immunity. Thus the time and circumstances are propitious for this Court's guidance and clarification concerning the proper way to implement the rule in *Kastigar*.

2. The Importance, Under Immunity Statutes, Of Safeguarding The Fifth Amendment Privilege And The Integrity Of Criminal Prosecutions Demands Review Of This Case.

In *Kastigar* the Court noted that it "has been zealous to safeguard the values which underlie the privilege" against compulsory self-incrimination, 406 U.S. at 445, and defined the basic constitutional question raised by the use immunity statute (*id.* at 450):

> The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege.

To this fundamental question the Court not only gave a clear and affirmative answer, but sought to ensure enforcement by imposing on the government the "heavy burden" of demonstrating that its evidence was wholly derived from legitimate sources independent of the immunized testimony. While expressing an awareness of "the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity," the Court took care to explain that with its imposition of the heavy burden on the government, a witness accorded statutory use immunity "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."[18] *Id.* at 460.

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[18] In *United States* v. *Nemes*, 555 F.2d 51, 55 (2d Cir. 1977), the court stated:

Yet if the government's heavy burden may be sustained solely by untested affidavits, without an evidentiary hearing—as the courts below permitted in this case—the witness' protection would indeed depend on the integrity and good faith of the prosecutor. Without an opportunity to confront and examine the affiants, the witness is barred from discovering whether and how direct or indirect use of his immunized testimony has disadvantaged him in the subtle ways against which *Kastigar* sought to safeguard him.

The stringent safeguards prescribed in *Kastigar* are as important for the government as for witnesses, as demonstrated in the *Kurzer* and *DeDiego* cases, *supra*. In each of those cases, the prosecution depended on an opportunity for the government to show it could make its case independent of immunized testimony. Thus an evidentiary hearing is as critical to the integrity of a prosecution as to the constitutional rights of a defendant.

Lest the effectiveness of the rule prescribed in *Kastigar* be jeopardized by procedural or evidentiary uncertainties, the Court should take this occasion to clarify the evidentiary implications of the *Kastigar* decision.

The prosecutor may never have seen the witness's testimony and may believe in good faith that no one associated with the federal prosecutor has seen it, but such a disclaimer does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators.

The affidavits filed in the instant case, of course, enhance rather than preclude the possibility that one or more persons, such as the trustee's attorney (who discussed at least one aspect of Rogers' immunized testimony with the FBI investigator), the newsman, and the newsman's unidentified interviewees had provided evidence based on the immunized testimony.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

RONALD G. PRECUP
NUSSBAUM, OWEN & WEBSTER
1800 M Street, N.W.,
Washington, D.C. 20036

Counsel of Record for Petitioner

Of Counsel:

LUCIEN HILMER
1800 M Street, N.W.
Washington, D.C. 20036

NORMAN D. JAMES
10960 Wilshire Boulevard
Los Angeles, California 90024

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kent Borden ROGERS,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jacob N. PEILTE,
Defendant-Appellant.

Nos. 82-1286, 82-1287.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 4, 1983.
Decided Dec. 28, 1983.

Defendants were convicted in the United States District Court for the Central District of California, Wm. Matthew Byrne, Jr., J., of substantive bankruptcy fraud and conspiracy to commit bankruptcy fraud, and they appealed. The Court of Appeals, Nelson, Circuit Judge, held that: (1) the Government's evidence was not tainted by use of defendant's immunized bankruptcy testimony; (2) joinder of defendants was proper; (3) defendants were not entitled to dismissal on the basis of preindictment delay; and (4) from evidence presented

jury could reasonably have decided that defendants were guilty of charges in question.

Affirmed.

Percy Anderson, Los Angeles, Cal., for plaintiff-appellee.

Norman D. James, Los Angeles, Cal., Jacob N. Peilte, Santa Ana, Cal., for defendant-appellant.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, ANDERSON and NELSON, Circuit Judges.

NELSON, Circuit Judge:

Kent B. Rogers and Jacob N. Peilte appeal convictions for substantive bankruptcy fraud and conspiracy to commit bankruptcy fraud. They allege the use of evidence based on immunized testimony, improper joinder in the indictment, prejudice caused by pre-indictment delay, and insufficient evidence to support their convictions. We affirm.

FACTS AND PROCEDURAL BACKGROUND

This case arises out of appellant's activities in connection with the bankruptcy of Global Western Development Corporation (Global). Rogers was president and majority shareholder of Global and Peilte was his attorney. In 1973 Global entered into a joint venture with another company to develop a residential housing project in Riverside, California. In a second unrelated transaction, Global purchased a ranch in Orange County in 1975. In 1976 the construction lender on the housing project foreclosed on its loan to Global. On October 4, 1976, the day before the foreclosure sale, Rogers and Peilte filed for bankruptcy under Chapter XI on behalf of Global. Two hours before this filing Rogers transferred the ownership of the ranch from Global to another corporation he owned.

In 1977 the bankruptcy court discovered the circumstances of the transfer of the ranch and promptly appointed a receiver

in bankruptcy for Global. The receiver procured a written stipulation from Rogers voiding the transfer. Upon a more complete audit of the bankrupt the receiver found evidence that Rogers and Peilte had on several occasions converted Global funds to their personal accounts. Peilte later denied such actions in sworn testimony before the bankruptcy court.

In 1978 the receiver requested that Rogers and Peilte provide him with all records pertaining to Global's financial affairs. Rogers and Peilte assured the receiver that no records had been withheld. A few months later, however, Global's former landlord found several file cabinets of Global's records in an office once occupied by Global and turned them over to the receiver.

In September 1981, a federal grand jury indicted Rogers and Peilte for conspiracy to commit bankruptcy fraud and numerous counts of substantive bankruptcy fraud. In February 1982 the district court convicted Rogers of one count of conspiracy in violation of 18 U.S.C. § 371 (1976) and four counts of fraud in violation of 18 U.S.C. § 152 (1976), including concealment of real property, fraudulent receipt of money, and withholding documents and records from a trustee. Peilte was convicted of one count of conspiracy and five counts of fraud, including concealment of property, fraudulent receipt of money, and perjury. Rogers and Peilte were both sentences to five years concurrent imprisonment on each count, suspended on conditions of brief jail confinement, probation for five years, community service, and fines.

Appellants raise four issues on appeal. They argue that (1) the trial court erred in refusing to dismiss the charges against Rogers, because the government did not carry its burden of proving that it did not use evidence based on immunized testimony he gave before the bankruptcy court; (2) Peilte was deprived of a fair trial because he and Rogers were improperly joined in the same indictment; (3) the indictments should have been dismissed because of preindictment delay; and (4) the evidence was insufficient to support their convictions.

DISCUSSION

I. Evidence Based on Immunized Testimony

Section 7(a) (10) of the Bankruptcy Act, 11 U.S.C. § 25 (a)(10) (1976),[1] provides use and derivative use immunity in a subsequent criminal case for testimony given by a bankrupt during certain bankruptcy proceedings which concern the circumstances of the failed business. This provision applies to Rogers' bankruptcy testimony because he was the officer who acted on behalf of Global at the bankruptcy proceedings. *See United States* v. *Coyne*, 587 F.2d 111 (2d Cir.1978).

[1-4] Grants of use and derivative use immunity prohibit the use of compelled testimony and evidence derived therefrom in later criminal proceedings. *Kastigar* v. *United States*, 406 U.S. 441, 443, 92 S.Ct. 1653, 1655, 32 L.Ed.2d 212 (1972). The scope of such immunity is coextensive with the privilege against self-incrimination afforded by the Fifth Amendment. *Id.* at 459, 92 S.Ct. at 1664. A grant of immunity casts on the government the burden of showing that the evidence it intends

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[1] 11 U.S.C § 25(a)(10) of the Bankruptcy Act was replaced by 11 U.S.C. § 344 of the Bankruptcy Code when the Code replaced the Act in 1978. § 344 incorporates the general immunity provisions of 18 U.S.C. § 6001 *et seq.* into bankruptcy proceedings. The bankruptcy petition in the present case was filed on October 4, 1976. Section 403 of Pub.L. 95-598, Title IV, Nov. 6, 1978, 92 Stat. 2683 provided that all cases commenced under the prior Act would be governed by its provisions.

Accordingly, § 25(a)(10) of the Act states in relevant part:

> "The bankrupt shall . . . (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealing with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge. . .

to present in a subsequent criminal prosecution is derived from a source independent of immunized testimony. *United States* v. *Weiner*, 578 F.2d 757, 774 (9th Cir.1978), *cert. denied*, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651 (1978). The government's burden of proof under *Kastigar* may be met by a preponderance of the evidence. *See United States* v. *Romano*, 583 F.2d 1, 7 (1st Cir.1978); *United States* v. *Seiffert*, 501 F.2d 974, 982 (5th Cir.1974).

Before his criminal trial Rogers moved to require the government to satisfy its burden under *Kastigar*, and the district court found that the government's evidence was not tainted by Rogers' bankruptcy testimony. This finding must be upheld unless clearly erroneous. *See United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980); *United States* v. *Romano*, 583 F.2d 1, 7 (1st Cir.1978).

[5] Rogers claims that the government's showing fails at three points. First, Rogers insists that the lower court improperly placed on him the burden of proving that the prosecutor's evidence came from an immunized source. At the pretrial hearing the government filed sworn declarations by prosecutors, investigators and witnesses that both denied access to Rogers' bankruptcy testimony and affirmatively specified the independent sources of evidence upon which the government actually relied. In light of this exhaustive filing, Rogers' claim is untenable. *See Weiner, supra*, 578 F.2d at 774-75.

[6] Second, Rogers contends that the attorney for the trustee, Mr. McDonnell, who was present during the bankruptcy proceedings, testified at the criminal trial on matters he could have learned only by listening to Rogers' immunized testimony. This contention is likewise without merit. The subject of McDonnell's testimony concerned Global's fraudulent transfer of the ranch to another company owned by Rogers just before Global filed for bankruptcy. McDonnell, acting on behalf of the trustee, had talked on the phone and had met with Rogers and Peilte in October 1977 to discuss the circumstances of the

transfer and to request reconveyance of the ranch to Global. It is clear that McDonnell's testimony about the actions of Rogers and Peilte was based on information McDonnell learned in these negotiations rather than on Rogers' bankruptcy testimony.

[7] Third, Rogers argues that Count Eleven of the indictment, which charged him with concealing records, is tainted. He alleges tainted grand jury testimony by the trustee, who testified that Rogers had stated in a prior court proceeding that he had additional records of Global and would deliver them to the trustee. While this statement by the receiver before the grand jury was improper, it was harmless in light of the more than adequate untainted evidence to support the indictment. *See United States* v. *Shelton*, 669 F.2d 446, 464 (7th Cir.1982), *cert. denied*, 456 U.S. 934, 102 S.Ct. 1989, 72 L.Ed.2d 454 (1982). The record adequately supports the conclusion that the basis for Count Eleven was information received from Rogers' former landlord advising the trustee of several abandoned Global file cabinets.[2]

II. Improper Joinder

Rule 8(b) of the Federal Rules of Criminal Procedure sets forth the standard governing the joinder of defendants:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or seperately and all of the defendants need not be charged in each count.

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[2] In light of our resolution of this issue, we need not reach the question posed by the parties whether the proper remedy for use of tainted evidence is suppression of the evidence or dismissal of the counts in the indictment based upon the evidence.

We have noted that because this rule embodies a substantial public interest in efficient use of judicial resources, joint trials are the rule rather than the exception. *United States* v. *Brashier*, 548 F.2d 1315, 1324 (9th Cir.1976), *cert. denied*, 429 U.S. 1111, 97 S.Ct. 1149, 51 L.Ed.2d 565 (1977).

[8, 9] The burden rests on the appellant to show that the joint trial was "manifestly prejudicial," *United States* v. *Cruz*, 536 F.2d 1264, 1267—68 (9th Cir.1976), and that the lower court abused its discretion by failing to sever. *United States* v. *Kennedy*, 564 F.2d 1329, 1334 (9th Cir.1977), *cert. denied*, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). Peilte has made no such showing here. On the contrary, he and Rogers were accused of working together in a common plan to make a fraudulent transfer of the ranch out of Global, to convert Global funds to themselves, and to conceal their acts from the bankruptcy court. While the conspiracy count alone may not justify their joinder, *Metheany* v. *United States*, 365 F.2d 90, 94 n. 4 (9th Cir.1966), the combination of the conspriacy and joint offenses involved in the substantive counts were certainly sufficient to do so. *See, e.g., United States* v. *Patterson*, 455 F.2d 264 (9th Cir.1972).

III. Pre-indictment Delay

[10] The due process clause of the Fifth Amendment has "a limited role to play" in protecting defendants against pre-indictment delay. *United States* v. *Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048. 52 L.Ed.2d 752 (1977). The applicable statute of limitations is the primary guarantee against the prosecutor bringing stale criminal charges. *United States* v. *Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966). The government is otherwise under no duty to file charges as soon as probable cause exists or even when there is enough evidence to establish guilt beyond a reasonable doubt. *Lovasco*, 431 U.S. at 791—95, 97 S.Ct. at 2049—2051; *United States* v. *Pallan*, 571 F.2d 497, 499—501 (9th Cir.1978), *cert. denied*, 436 U.S. 911, 98 S.Ct. 2249, 56 L.Ed.2d 411 (1978).

[11-13] In order to block a prosecution on the basis of pre-indictment delay, the defendant must first show actual, nonspeculative prejudice resulting from the delay. *United States* v. *Marion*, 404 U.S. 307, 322—26, 92 S.Ct. 455, 464—466, 30 L.Ed.2d 468 (1971); *United States* v. *Stone*, 633 F.2d 1272, 1274 (9th Cir.1979). Once this showing is made, the due process inquiry considers the reasons for and length of the delay. *United States* v. *Mays*, 549 F.2d 670, 677—78 (9th Cir.1977). We review the lower court's decision denying appellants' motion to dismiss the charges for pre-indictment delay for an abuse of discretion. *United States* v. *Mills*, 641 F.2d 785, 789 (9th Cir. 1981), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409, 70 L.Ed.2d 221 (1981).

[14]Rogers and Peilte argue that they were prejudiced by the destruction of a bankruptcy court reporter's notes that would have corroborated Rogers' testimony at the criminal trial. The assertion that missing testimony might have been useful, however, does not show the "actual" prejudice required by *Marion*. *See United States* v. *Pallan*, 571 F.2d 497, 501 (9th Cir.1978), *cert. denied*, 436 U.S. 911, 98 S.Ct. 2249, 56 L.Ed.2d 411 (1978); *United States* v. *Mays*, 549 F.2d 670, 680 (9th Cir.1977). Here appellants merely contend that the alleged notes might have corroborated Rogers' existing testimony. *See United States* v. *King*, 560 F.2d 122, 130-31 (2d Cir.1977), *cert. denied*, 434 U.S. 925, 98 S.Ct. 404, 54, L.Ed.2d 283 (1977). Furthermore, appellants had three months to procure the notes between the issuance of the indictment in September and the destruction of the notes in December. We find that Rogers and Peilte have failed to demonstrate the threshold requirement of actual prejudice caused by the delay. It is therefore unnecessary for us to consider the length of or reasons for the dealy. *See United States* v. *Mills*, 641 F.2d 785, 789 (9th Cir.1981), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409, 70 L.Ed.2d 221 (1981).

IV. Sufficiency of the Evidence

[15] In reviewing whether there was sufficient evidence to support appellant's convictions, we view that evidence and the inferences therefrom in the light most favorable to the government and determine whether "the jurors could reasonably decide that they would not hesitate to act in their own affairs upon factual assumptions as probable as the conclusion that the defendant is guilty." *United States* v. *Oropeza*, 564 F.2d 316, 321 (9th Cir.1977), *cert. denied*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978). After such a review, we conclude that a jury could reasonably decide that Rogers and Peilte were guilty of the charges in question.

The appellants' convictions are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 81-845-WMB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENT B. ROGERS and
JACOB N. PEILTE,

Defendants.

FILED
AUG 27 1982
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY ???? DEPUTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Kent B. Rogers and Jacob N. Peilte are charged in a ten-count indictment with conspiracy to commit bankruptcy fraud and various substantive bankruptcy fraud offenses in violation of 18 U.S.C. §§ 371 and 152. Defendants having waived a jury trial, a trial was had before the Court sitting without a jury. The defendants have requested special findings under Rule 23 (c) of the Federal Rules of Criminal Procedure. The Court having fully considered the pleadings, the testimony, and the exhibits introduced at trial, the stipulations of the parties, the facts established during the trial, the oral argument of counsel and otherwise being fully advised of the premises, makes the following Findings of Fact beyond a reasonable doubt and reached the following Conclusions of Law.

FINDINGS OF FACT

1. On February 28, 1974 Global Western Development Corporation (hereinafter "Global") was incorporated and organized under the laws of the State of California, with its principal place of business in Tustin, California.

2. Defendant Kent B. Rogers was the majority stockholder and president of Global.

3. Defendant Jacob N. Peilte was a former officer with Global and from its inception in 1974 to 1979 was its attorney acting on its behalf.

4. KFR, Inc. was a corporation organized under the laws of the State of Nevada, with its principle place of business in Tustin, California.

5. Defendant Kent B. Rogers owned, controlled and operated KFR, Inc. as his personal holding company.

6. From 1974 Global was engaged in land development and residential housing construction.

7. On November 3, 1973 Global entered into a Joint Venture Agreement with M & S Development Corporation (hereinafter M & S) for the construction of a residential housing project in Riverside, California.

8. Under the terms of the agreement, Global was to obtain financing for the project, while M & S was to furnish three undeveloped parcels of real property.

9. On April 11, 1974, Global through its president, defendant Rogers obtained a $1,500,000 loan from Securities Intermountain Company of Portland, Oregon (hereinafter SIMCO) to begin construction of the project.

10. On February 7, 1975, Global purchased approximately 2700 acres of undeveloped real property in south Orange County known as the Whiting Ranch from the El Toro Company for $2,000,000.

11. The terms of the sale provided that Global would make a $400,000 down payment and assume a mortgage of $1,600,000 secured by a deed of trust.

12. On February 7, 1975, Global issued two promissory notes to Scheer Financial Corporation in the aggregate amount of $3,712,000 secured by two deeds of trust on portions of the Whiting Ranch.

13. On February 11, 1975, Global issued a promissory note to McIngvale Associates General Agency, Inc. in the amount of $1,208,000 secured by a deed of trust on a portion of the Whiting Ranch.

14. On February 7, 1975, Global issued three promissory notes to Seaboard Life Insurance Company in the aggregate amount of $12,280,500 secured by three deeds of trust on portions of Whiting Ranch.

15. On February 11,1975, Global issued two promissory notes to McIngvale Associates General Agency, Inc. in the aggregate amount of $8,800,000 secured by two deeds of trust on portions of the Whiting Ranch.

16. There was no consideration given for any of the promissary notes or deeds of trust issued to either Scheer Financial Corporation, Seaboard Life Insurance Company or McIngvale Associates General Agency. All of the deeds of trust were recorded in Orange County, California.

17. On July 24, 1975, Global defaulted on its mortgage to the El Toro Company. The El Toro Company filed a Notice of Default upon the first trust deed note electing to foreclose on the Whiting Ranch.

18. On September 19, 1975, Global, through its attorney, defendant Jacob N. Peilte filed an action in Orange County Superior Court entitled *Global Western Development Corporation* v. *The El Toro Company, et al.*, seeking to enjoin the foreclosures.

19. Global was unable to enjoin the El Toro Company's foreclosure because of its failure to post the required bond.

20. On November 19, 1975, defendant Rogers, represented by defendant Peilte, was deposed by attorneys for the El Toro Company and freely admitted that Global owned the Whiting Ranch.

21. In November 1975, McIngvale Associates General Agency filed bankruptcy in the United States District Court in Dallas, Texas.

22. On December 2, 1975, by certified mail, Phillip Palmer, as the attorney for the McIngvale Associates General Agency bankruptcy trustee, wrote Global a letter, giving notice of acceleration of all of Global's trust deeds and promissory notes and demanding full payment.

23. On December 30, 1975, the Los Alisos Water District filed a suit for condemnation of the Whiting Ranch against Global, Seaboard, and the El Toro Company.

24. On April 13, 1976, Peilte wrote Palmer a letter on the letterhead of Global, in which he agreed on behalf of Rogers to the sale of the Whiting Ranch. The proceeds of the sale were to be divided equally between defendant Rogers and the McIngvale interests.

25. On May 4, 1976, Global, through its attorney defendant Peilte, filed a verified answer to the condemnation suit. The answer affirmatively alleged that Global owned the Whiting Ranch and was entitled to compensation for the condemnation.

26. In the latter part of 1976, SIMCO alleging a default on its note sought a judicial foreclosure on the Riverside property.

27. On October 4, 1976, at approximately 1:30 p.m., defendant Rogers transferred title of the Whiting Ranch from Global to KFR, Inc. There was no consideration for the transfer.

28. On October 4, 1976, at approximately 3:00 p.m., defendant Rogers filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court. The petition, prepared by defendant Peilte and signed by defendant Rogers, was entitled "In re GLOBAL WESTERN DEVELOPMENT CORPORATION, a California corporation."

29. On October 12, 1976, defendants Rogers and Peilte filed two bankruptcy schedules entitled "Statement of All Debts of Petitioner and a Statement of Affairs." Neither document made any mention of the Whiting Ranch or its transfer. The documents listed only the Riverside property and liabilities attributable to that property.

30. The Riverside property consisted of approximately twenty-six homes, the construction of which was almost completed, and approximately thrity-five vacant lots.

31. On November 9, 1976, Rogers represented by Peilte, appeared as a witness at a deposition in the Los Alisos litigation. He produced the original grant deed transferring the Whiting Ranch and admitted that Global owned the Whiting Ranch.

32. On January 12, 1977, a savings account was opened on behalf of the bankrupt's estate at the Bank of Newport requiring the joint signatures of defendant Peilte and United States Bankruptcy Judge Aaron K. Phelps.

33. On April 21, 1977, defendant Peilte withdrew $10,000 from the Global Savings Account in the form of a cashiers check. On that same day, he deposited the $10,000 into his trust account at the Santiago Bank in Newport Beach, California.

34. On April 22, 1977, defendant Peilte purchased an $8,000 cashiers check from his trust account, payable to Global Western Development Corporation. On that same day, the cashiers check was endorsed by Rogers and negotiated at the Riverside National Bank in Riverside, California. Rogers caused $2,000 to be deposited into Global's account and the balance to be returned in cash.

35. On April 22, 1977, Peilte drew a $1,000 check payable to himself from his trust account. He then deposited the $1,000 check into his personal checking account at the Santiago Bank in Tustin, California.

36. On May 4, 1977, defendant Peilte withdrew a $1,000 check payable to himself from his trust account. He then deposited the $1,000 check into his personal checking account at the Santiago Bank in Tustin, California.

37. On July 25, 1977, defendant Peilte withdrew $6,700 from the Global Savings Account in the form of a cashiers check and deposited it into his trust account at the Santiago Bank in Newport Beach, California.

38. On July 27, 1977, defendant Peilte drew a check payable to Global Western Development Corporation in the amount of $6,700 from his trust account at the Santiago Bank in Newport Beach, California.

39. On July 27, 1977, this check was endorsed by Global for deposit only and deposited into the account of KFR, Inc. at the Bank of Newport in Newport Beach, California.

40. On July 28, 1977, defendant Peilte withdrew $1,300 from the Global Savings Account in the form of a cashiers check and deposited it into his trust account at the Santiago Bank in Newport Beach, California.

41. On August 18, 1977, defendant Peilte drew a check payable to himself in the amount of $1,300 from his trust account at the Santiago Bank in Newport Beach, California and deposited into his personal account at the Santiago Bank in Tustin, California.

42. On September 27, 1977, a creditor for the joint venture announced at a bankruptcy hearing his claim that the Whiting Ranch should be an asset of the bankrupt's estate. The bankruptcy action had proceeded for ten months without any mention of the fact that Global owned the Whiting Ranch.

43. As a result of the claim, United States Bankruptcy Judge Aaron K. Phelps appointed Thomas Wood as a Receiver for the bankrupt's estate.

44. The Receiver, through his attorney, C. E. H. McDonnell, began negotiations with defendants Peilte and Rogers to set aside the conveyance of the Whiting Ranch from Global to KFR, Inc.

45. On October 26, 1977, a stipulation was entered into by defendant Rogers and the Receiver in which defendant Rogers agreed that the original transfer of the Whiting Ranch to KFR, Inc. was void and that title to the ranch rested with Global.

46. Shortly after the stipulation was executed, Thomas Wood was replaced as Receiver by Robert Fisher. Fisher then conducted an audit of Global's financial records.

47. On November 23, 1977, defendant Peilte filed a document with the United States Bankruptcy Court entitled "Accounting of Proceeds." The document listed as expenses $6,700 and $1,300 paid to Bester Engineering.

48. Joseph Bester is a building contractor who worked on the Riverside housing project. Despite frequent demands to defendant Peitle for payment, he never received compensation for his work from either defendant Peilte or defendant Rogers.

49. Shortly after Robert Fisher's appointment as Receiver, he contacted defendants Rogers and Peilte and requested all of Global's books and records.

50. In response to Fisher's request, defendant Rogers furnished ledgers, journals, checks and miscellaneous records for the Riverside property for the year 1974. Both defendants Rogers and Peilte maintained that records provided were all of the records for Global.

51. On February 16, 1978, Fisher sent a letter addressed to both defendant Rogers and defendant Peilte demanding all of the books and records of Global Western Development Corporation including "right down to the last scrap of paper that has anything to do with Global from its inception to now."

52. On February 17, 1978, Fisher again asked both defendant Rogers and defendant Peilte if he was in possession of all of Global's books and records. Defendant Rogers and defendant Peilte assured Fisher that he was in possession of all of the books and records.

53. On April 21, 1978, Fisher was notified by Global's landlord that Global had been evicted from their offices and there appeared to be several file cabinets on the premises belonging to Global.

54. On April 26, 1978, an inspection of the file cabinets by Fisher revealed among many other Global documents, Global's general ledger for 1975, files pertaining to SIMCO, the Riverside property, McIngvale Associates General Agency, and other documents including bank reconciliations for Global. Included in the documents was a financial statement, dated January 31, 1975, which indicated that Global had $500,000 in cash and owned not only the Riverside property, but the Whiting Ranch as well. The financial statement valued the Whiting Ranch at $25,000,000.

55. Inside a locked file cabinet, Fisher discovered Global's corporate minute book, stock book, the original agreement setting for the terms and conditions of Global's purchase of the Whiting Ranch, including an appraisal of the property and an environmental impact report.

56. On April 27, 1978, Fisher found additional Global records in a public storage facility leased by Global Western Development Corporation.

57. On March 29, 1978, defendant Peilte appeared as a witness in the United States Bankruptcy Court. He was sworn as a witness and under oath testified that he had given the $10,000 withdrawn from his trust account on April 22, 1977 to Global Western Development Corporation. He testified that he had given defendant Rogers a check for $8,000 and two $1,000 checks.

58. The defendants claimed they intended to file the bankruptcy action on behalf of the joint venture, and not on behalf of the corporation.

59. At no time during the pendency of the bankruptcy proceedings did defendant Rogers ever notify anyone of his claim that he intended to file the bankruptcy action on behalf of the joint venture.

60. Defendant Peilte claims to have advised C. E. H. McDonnell in late September or early October of 1977 of his claim that he intended to file the bankruptcy action on behalf of the joint venture and not on behalf of the corporation.

61. McDonnell disputes defendant Peilte's contention and testified that the first time he heard such a claim was in 1979 from Alan Curtis, another attorney representing Global.

62. United States Bankruptcy Judge Aaron K. Phelps testified that the first time he heard the claim that the action was filed on behalf of the joint venture was in 1981.

63. There was not a single document filed in the bankruptcy action that indicated that the action was filed on behalf of the joint venture.

64. The petition and schedules filed on behalf of Global were filed on behalf of the corporation and not on behalf of the joint venture.

65. All of the documents filed in the bankruptcy action were filed on behalf of Global Western Development Corporation as a corporate entity.

66. Both the bankruptcy judge and the attorney for the receiver viewed the action as filed on behalf of the corporation and not on behalf of the joint venture.

67. Defendant Rogers' claim that he transferred the Whiting Ranch from Global to KFR, Inc. on October 4, 1976, because he wished to enhance his opportunity to find a source of financing for the development of the ranch is not credible.

68. Defendant Rogers' claim that he intended to file the bankruptcy action on behalf of the joint venture and not on behalf of the corporation is not credible.

69. Defendant Peilte's claim that he intended to file the bankruptcy action on behalf of the joint venture and not on behalf of the corporation is not credible.

70. It is unreasonable to believe that the defendants intended to file an action on behalf of the joint venture, but did not communicate that intention to any of the bankruptcy court officials during the pendency of the bankruptcy proceedings.

71. The petition, schedules and documents filed during the course of the bankruptcy proceeding should have been alerted a prudent and reasonable person that the action was filed on behalf of the corporation and not on behalf of the joint venture.

72. The bankruptcy action filed on behalf of Global Western Development Corporation was filed on behalf of the corporation and not on behalf of the joint venture.

73. Immediately prior to October 4, 1976, defendants Rogers and Peilte both knew that the legal title to the Whiting Ranch rested with Global.

74. On October 4, 1976, defendants Rogers and Peilte knew of the transfer of the Whiting Ranch from Global to KFR, Inc.

75. Defendant Rogers did not disclose Global's ownership of the Whiting Ranch during the pendency of the bankruptcy proceedings.

76. Defendant Rogers knew he was required to disclose Global's ownership of the Whiting Ranch to the bankruptcy court.

77. Defendant Peilte did not disclose Global's ownership of the Whiting Ranch during the pendency of the bankruptcy proceedings.

78. Defendant Peilte knew he was required to disclose Global's ownership of the Whiting Ranch to the bankruptcy court.

79. In October, 1976, defendants Rogers and Peilte willfully and knowingly agreed to conceal the existence of the Whiting Ranch from the bankruptcy court.

80. Defendant Rogers was not a credible witness. Defendant Rogers did not act in good faith. The bankruptcy petition and accompanying schedules filed on behalf of Global omitted any reference to the Whiting Ranch. They were not filed by defendant Rogers in reliance on the advice of his counsel.

81. Defendant Peilte was not a credible witness. Defendant Peilte did not act in good faith when he omitted any reference to the Whiting Ranch in the bankruptcy petition and accompanying schedules filed on behalf of Global.

82. In October, 1976, defendants Rogers and Peilte willfully and knowingly agreed to receive money belonging to the estate of Global.

83. On October 4, 1976, defendant Rogers knowingly and fraudulently transferred and concealed the Whiting Ranch in contemplation of filing a bankruptcy action on behalf of Global.

84. On October 4, 1976, and continuously thereafter until September 26, 1977, defendants Rogers and Peilte knowingly and fraudulently concealed Whiting Ranch from the bankruptcy court and the creditors of Global.

85. On April 22, 1977, defendant Peilte knowingly and fraudulently received $1,000 belonging to the estate of Global.

86. On May 4, 1977, defendant Peilte knowingly and fraudulently received $1,000 belonging to the estate of Global.

87. On July 27, 1977, defendant Rogers knowingly and fraudulently received $6,700 belonging to the estate of Global.

88. On August 18, 1977, defendant Peilte knowingly and fraudulently received $1,300 belonging to the estate of Global.

89. On March 29, 1979, defendant Peilte testified falsely under oath that he had paid $10,000 belonging to the estate of Global to Rogers, whereas, in truth and fact, as he well knew, he had paid $8,000 to defendant Rogers and had converted $2,000 to his own use.

90. On October 4, 1976, and continuing thereafter until April 26, 1978, defendant Rogers knowingly and fraudulently withheld from the bankruptcy court and Robert Fisher, a duly appointed Receiver and Trustee, documents, records, and papers relating to the financial affairs of Global.

91. Defendant Rogers' claim that he provided all of the documents he had available to the bankruptcy Receiver is unworthy of belief. The volume, nature and extent of the documents found in defendant Rogers' office disputes his claim. A prudent person would have reasonably foresaw the use of such documents by the bankruptcy court and the Receiver. The Receiver and the bankruptcy court were entitled to have the documents found in defendant Rogers' office as they related to the property and financial affairs of Global.

92. Defendants Rogers' and Peilte's scheme to defraud the bankruptcy court and the creditors of Global was reasonably calculated to deceive persons of ordinary prudence and comprehension.

93. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Findings of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. This Court has jurisdiction over the subject matter of this case and over the defendants Rogers and Peilte. 18 U.S.C. § 371 and 152.

3. Venue is proper in this Court. Rule 18 of the Federal Rules of Criminal Procedure.

4. Beginning in October, 1976, defendants Rogers and Peilte willfully and knowingly conspired to conceal property and assets belonging to the estate of Global Western Development Corporation, as charged in Count One of the Indictment.

5. On October 4, 1976, defendant Rogers in contemplation of filing bankruptcy on behalf of Global with the intent to defeat the bankruptcy laws, knowingly and fraudulently transferred and concealed the real property known as the Whiting Ranch.

6. On October 4, 1976, and continuously thereafter until on or about September 26, 1977, defendants Rogers and Peilte knowingly and fraudulently concealed from the bankruptcy court and the creditors of Global, the real property known as the Whiting Ranch.

7. On April 22, 1977, defendant Peilte knowingly and fraudulently with the intent to defeat the bankruptcy laws, received $1,000 belonging to the estate of Global.

8. On May 4, 1977, defendant Peilte knowingly and fraudulently with the intent to defeat the bankruptcy laws received $1,000 belonging to the estate of Global.

9. On July 27, 1977, defendant Rogers knowingly and fraudulently with the intent to defeat the bankruptcy laws received $6,700 belonging to the estate of Global.

10. On August 18, 1977, defendant Peilte knowingly and fraudulently with the intent to defeat the bankruptcy laws received $1,300 belonging to the estate of Global.

11. On March 29, 1979, defendant Peilte, while under oath as a witness, knowingly and fraudulently and contrary to his oath, made a false oath as to a material matter when he testified that he paid $10,000 belonging to the estate of Global to defendant Rogers, whereas, in truth and fact, as defendant Peilte then and there well knew, he paid $8,000 to defendant Rogers and converted $2,000 to his own use.

12. On October 4, 1976, and continuously thereafter until April 26, 1978, defendant Rogers knowingly and fraudulently

withheld from the bankruptcy court and Robert Fisher, a duly appointed Receiver and Trustee for the estate of Global, documents, records, and papers relating to the property and financial affairs of Global.

13. An Order will be entered finding defendant Rogers guilty of violations of 18 U.S.C. § 371 and 152, as charged in Counts One, Two, Three, Eight and Eleven of the Indictiment.

14. An Order will be entered finding defendant Peilte guilty of violations of 18 U.S.C. § 371 and 152, as charged in Counts One, Three, Six, Seven, Nine and Ten of the Indictment.

15. An Order will be entered finding defendant Rogers not guilty of a violation of 18 U.S.C. § 152, as charged in Count Five of the Indictment.

16. An Order will be entered finding defendant Peilte not guilty of a violation of 18 U.S.C. § 152, as charged in Counts Two, Five and Eleven of the Indictment.

DATED: August 27, 1982

Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 81-845-WMB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENT B. ROGERS, *et al.*,

Defendant.

FILED
AUG 27 1982
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY ???? DEPUTY

ORDER

IT IS HERBY ORDERED that defendant Kent B. Rogers, having waived his right to a jury trial and the case having been tried before this Court sitting without a jury, is found GUILTY as charged in Counts One, Two, Three, Eight and Eleven of the Indictment. Defendant Kent B. Rogers is AQUITTED on Count Five of the Indictiment.

DATED: August 27, 1982

Wm. Matthew Byrne, Jr.
United States District Judge
WM. MATTHEW BYRNE, JR.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 81-845-WMB

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACOB N. PEILTE, *et al.*,

Defendants.

FILED
AUG 27 1982
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY ???? DEPUTY

ORDER

IT IS HEREBY ORDERED that defendant Jacob N. Peilte, having waived his right to a jury trial and the case having been tried before this Court sitting without a jury, is found GUILTY as charged in Counts One, Three, Six, Seven, Nine and Ten of the Indictment. Defendant Jacob N. Peilte is ACQUITTED on Counts Two, Five and Eleven of the Indictment.

DATED: August 27, 1982

Wm. Matthew Byrne, Jr.
United States District Judge
WM. MATTHEW BYRNE, JR.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1286
DC # CR 81-845-1-WMB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENT BORDEN ROGERS,
Defendant-Appellant.

FILED
MAY 01 1984
PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

ORDER

Before: CHAMBERS, ANDERSON AND NELSON, CIRCUIT JUDGES.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Anderson and Nelson voted to reject the suggestion for a rehearing en banc, and Judge Chambers recommended denial of the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

Supreme Court, U.S.
FILED
AUG 28 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2147

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENT BORDEN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

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In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government's documentary proof that the sources for its evidence were independent of his immunized testimony was insufficient to meet its burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972).

1. Following a bench trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud (18 U.S.C. 152, 371). He was sentenced to concurrent terms of five years' imprisonment, all but six months of which were suspended in favor of probation, and fined $20,000. The court of appeals affirmed (Pet. App. 1a-9a).

a. The evidence at trial, the sufficiency of which is not disputed, showed that petitioner concealed an asset of a bankrupt estate from the court and creditors, fraudulently received funds of the estate, and withheld documents of the estate from the trustee in bankruptcy (Pet. App. 3a).

Petitioner was president and majority shareholder of Global Western Development Corporation (Global) (Pet. App. 2a). In February 1975, Global purchased 2,700 acres of undeveloped land known as the Whiting Ranch from El Toro Associates for $2 million, including a $1.6 million purchase money mortgage (*id.* at 2a, 11a). Global defaulted on its purchase mortgage in July 1975, and El Toro elected to foreclose; Global initiated unsuccessful proceedings to enjoin the foreclosure (*id.* at 12a-13a).

On October 4, 1976, petitioner transferred ownership of the ranch to his personal holding company. Two hours later, he and his attorney, Jacob N. Peilte,[1] filed a bankruptcy petition on behalf of Global. A foreclosure sale with respect to other property of Global's had been scheduled for the next day. Pet. App. 2a.

Statements of Global's assets filed by petitioner and Peilte did not list the Whiting Ranch or mention its transfer, although in a separate condemnation proceeding later in 1976 petitioner testified that Global owned the property (Pet. App. 14a). In September 1977, a creditor informed the bankruptcy court for the first time of the ranch (*id.* at 15a). A trustee was then appointed, and petitioner signed a stipulation voiding the transfer to his holding company (*id.* at 2a-3a). The trustee requested that petitioner and Peilte provide him with all records of Global's financial affairs. Although they assured the trustee that no records had been withheld, Global's former landlord later found several file cabinets of the company's records and turned them over to the trustee. *Id.* at 3a. During 1977, petitioner and Peilte fraudulently received funds of Global's estate (*id.* at 14a-15a, 20a).

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[1]Peilte was tried with petitioner and convicted on five counts of bankruptcy fraud and one count of conspiracy. His conviction was affirmed on appeal, and he did not file a petition for a writ of certiorari.

b. Prior to trial, petitioner moved pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), to require the government to prove that it did not use his immunized testimony before the bankruptcy court[2] in preparing its case against him. The government responded by filing sworn declarations of the prosecutors, the bankruptcy trustee, investigators and others, denying the government's access to or use of petitioner's immunized testimony and affirmatively specifying independent sources for its evidence against petitioner. After a hearing on the motion, the court found that the government's evidence was not tainted by petitioner's bankruptcy testimony (Pet. App. 5a); the court adhered to its ruling when petitioner renewed his motion during and after trial. The court of appeals affirmed, ruling that the government's "exhaustive filing" (*ibid.*) satisfied its burden under *Kastigar*.

2. Petitioner contends (Pet. 7-14) that the sworn declarations filed by the government did not satisfy its burden of proving an independent source for its evidence. His heavily factual arguments were correctly rejected by both courts below, and the court of appeals' decision does not conflict with the decisions of this Court or of any other court of appeals. Further review is unwarranted.

a. Petitioner appears to claim (Pet. 10-12) that the government's declarations did not adequately trace its evidence to sources independent of his immunized testimony.

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[2]Section 7(a)(10) of the former Bankruptcy Act (11 U.S.C. (1976 ed.) 25(a)(10)), which governed the Global proceeding, provided for automatic use and derivative-use immunity coextensive with the Fifth Amendment privilege against compelled self-incrimination. See *Block* v. *Consino*, 535 F.2d 1165, 1168 (9th Cir.), cert. denied, 429 U.S. 861 (1976). The present immunity provision of the Bankruptcy Code (11 U.S.C. 344) incorporates Part V of Title 18 (18 U.S.C. 6001 *et seq.*), which also provides immunity coextensive with the Fifth Amendment, but only after the privilege is invoked and immunity is applied for and granted. See *Kastigar* v. *United States, supra.*

The district court's decision to the contrary is not clearly erroneous[3] and was correctly upheld by the court of appeals. The declarations affirmatively traced the government's evidence to sources wholly independent of petitioner's testimony before the bankruptcy court.[4] On the basis of these declarations, the government demonstrated untainted sources for all of the evidence necessary for petitioner's conviction, including Global's purchase of the Whiting Ranch; its transfer to petitioner's holding company two hours before he and Peilte filed for bankruptcy on behalf of Global; their failure to list the ranch as an asset of Global's; the trustee's discovery of undisclosed documents relating to the financial affairs of Global; and petitioner's unauthorized receipt of funds belonging to the bankrupt estate. See, *e.g.*, Declaration and Supplemental Declaration of Percy Anderson; Declaration of Joseph Cordero paras. 3-7; Declaration of Richard S. Roberts paras. 8-10; Declaration of Robert A. Fisher. Review by this Court of petitioner's

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[3]A district court's finding that the government has met its burden of proof under *Kastigar* is one of fact reviewable under the clearly erroneous standard. *E.g., United States* v. *Romano*, 583 F.2d 1, 7 (1st Cir. 1978); *United States* v. *Jones*, 542 F.2d 186, 199 (4th Cir. 1976).

[4]Petitioner's claim (Pet. 10) that one of the prosecutor's declarations, which specified a newspaper article as an independent source, did not negate the reporter's access to immunized testimony is irrelevant in light of the reporter's own declaration, which did just that (as well as specifying the untainted sources relied on by the reporter). See Declaration of Joseph Cordero. Petitioner's assertion (Pet. 10-11) that the reporter's declaration is internally inconsistent is meritless. The full text of the statement quoted by petitioner (*id.* at 10) is "On the basis of that preliminary research, I expanded my inquiry to the United State [*sic*] Bankruptcy Court in Santa Ana *to examine a bankruptcy petition and a schedule of creditors filed in conection with the Whiting Ranch.*" Declaration of Joseph Cordero para. 4 (emphasis added). This is not inconsistent with the reporter's later statement (*id.* para. 7) that he did not have access to the "court proceedings," which referred quite obviously in context to petitioner's immunized courtroom testimony.

fact-bound claim that these declarations were inadequate is unwarranted. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

b. Petitioner's chief contention (Pet. 7-9, 12-14) is that he should have been permitted to cross-examine the government's declarants. This argument appears to be based in large part on petitioner's claim, just discussed, that the declarations did not contain enough information to satisfy the government's burden of proof (see *id.* at 12). To the extent that petitioner asserts an entitlement to a hearing at which live testimony is elicited even where documentary evidence has demonstrated an independent source, that claim is meritless. The courts of appeals have rejected the contention that live testimony is always required in order to prove that the government's evidence is not tainted by a defendant's immunized testimony.[5] See *United States* v. *Provenzano*, 620 F.2d 985, 1005-1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Sockwell*, 699 F.2d 213, 217-218 (5th Cir.), cert. denied, 461 U.S. 936 (1983); see also *United States* v. *Romano*, 583 F.2d 1, 8 (1st Cir. 1978); *United States* v. *Catalano*, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974). Petitioner admitted

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[5]The cases on which petitioner relies (Pet. 8-9) do not stand for the propositon that a full-fledged hearing is always required under *Kastigar*. In *United States* v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982), and *United States* v. *Beery*, 678 F.2d 856 (10th Cir. 1982), the government had only disclaimed use of immunized testimony without affirmatively demonstrating an independent source for its evidence. The courts did not address the question whether proper documentary evidence could satisfy the government's burden of proof. In *United States* v. *Kurzer*, 534 F.2d 511 (2d Cir. 1976), and *United States* v. *DeDiego*, 511 F.2d 818 (D.C. Cir. 1975), the courts held only that the indictments should not have been dismissed without affording the government an adequate opportunity to disprove the defendants' taint claims. Finally, none of the cases cited by petitioner (Pet. 9) as relying on testimonial evidence required that the evidence be live rather than documentary; the cases simply did not address that issue.

in the court of appeals that he was given opportunities to come forward with evidence of taint to rebut the government's showing, but did not do so. See Appellant's Opening Br. 28. The procedure followed by the district court was accordingly fully adequate to protect petitioner's interests. See *United States* v. *Weiner*, 578 F.2d 757, 774-775 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (requiring defendant to present evidence of taint after government has proven an independent source does not improperly shift burden of proof to defendant). Nothing more is required by this Court's decision in *Kastigar*[6] or by the decisions of any of the courts of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

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[6] *Kastigar* "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony" (406 U.S. at 460). As both courts below held, the government satisfied that burden here by producing the declarations of its prosecutors and others. There is nothing in *Kastigar* or in *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964), that would require live testimony in these circumstances.